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No. 79-652

IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

NATIONAL BANCSHARES CORPORATION OF TEXAS, ET AL.,

Petitioners,

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

REPLY MEMORANDUM FOR PETITIONERS

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1. Respondents argue that the Supreme Court of Texas, in upholding the imposition of increased state taxes upon petitioners, was merely following the "mandate" or "edict" of Pub. L. 91-156. Br. in Opp. 7, 13. In so arguing, respondents make it clear that this case squarely presents the problem of federal determination of and interference with state taxation of nonbanking corporations.

Of course, petitioners believe that respondents and the Supreme Court of Texas have misconstrued Pub. L. 91-156. *See* Pet. 8-10. But if, as respondents argue, the federal statute did mandate the imposition of additional state taxes upon petitioners, then the statute is unconstitutional as so applied. *See* Pet. 10-12.

Respondents completely miss the point of the constitutional issue in this case. In purporting to address that issue, they argue only the well established proposition that the extent to which a state may tax national banks depends upon federal law. Br. in Opp. 6-13. No one disputes this point, but it is wholly irrelevant. This case does not concern the taxation of national banks. The constitutional issue here is whether the federal government has authority to require a state to impose additional taxes upon nonbanking corporations. Petitioners have shown that the federal government lacks such authority, and respondents have made no argument to the contrary.

2. Respondents' argument that the decision of the Supreme Court of Texas rests upon an independent state ground, Br. in Opp. 13-15, is frivolous. Respondents rely upon the court's determination that petitioners were not covered by 1971 Tex. Gen. Laws, Ch. 292, art. 7, § 1 ("H. B. 730"), which provides in pertinent part that "[t]he passage of Public Law 91-156 . . . shall not operate to impose or permit the imposition of any additional tax or taxes upon the institutions affected thereby."[1] But the court's construction of H. B. 730, standing alone, was not adequate to support the judgment below.

Respondents have contended throughout the litigation that the additional state taxes assessed against petitioners were justified and required by Pub. L. 91-156. Petitioners countered that Pub. L. 91-156 neither could nor did require the imposition of additional taxes on nonbanking corporations and that, in any event, H. B. 730 barred such imposi-

[1] If respondents are correct that Pub. L. 91-156 is a mandatory edict, then there is substantial doubt whether the State of Texas could exempt from the operation of Pub. L. 91-156 any taxpayer truly subject to that federal law. In any event, petitioners have not sought review of the holding below concerning the scope of H. B. 730.

tion. The determination by the court below on the second issue, that H. B. 730 did not bar the possible application of Pub. L. 91-156 to petitioners, obviously was not a sufficient basis for disposition of the entire case. By itself, that determination left open the more fundamental federal questions of just what Pub. L. 91-156 did and constitutionally could require. The judgment sustaining the imposition of the additional state taxes necessarily was grounded in the court's agreement with respondents that Pub. L. 91-156 could and did require the imposition of state taxes that theretofore had not been and could not have been imposed. That judgment therefore is rooted in federal law and does not rest upon an independent state ground.

3. Respondent's argument that the federal constitutional question presented in the petition was not adequately preserved below, Br. in Opp. 15-17, is both immaterial and factually incorrect. Respondents' argument is immaterial because they implicitly concede, as they must, that the question of federal statutory construction is within this Court's jurisdiction.[2] Questions of statutory construction and constitutional validity are inextricably interrelated, with the consequence that this Court's power to construe the federal statute necessarily includes power to determine whether the statute as so construed is constitutional. Accordingly, since the Court has jurisdiction in this case to determine the proper construction of Pub. L. 91-156, *a fortiori* the Court also has jurisdiction to decide the constitutional question that depends upon that construction.

[2] The Court of Civil Appeals explicitly decided the question of construction when it held that Pub. L. 91-156 should not be construed so as to impose additional taxes on petitioners, *see* Pet. at B-9-13, and thus there can be no doubt that that question was properly before the Texas Supreme Court on writ of error, *McKelvy v. Barber*, 381 S.W.2d 59 (Tex. 1964), and has been preserved for decision here.

Respondents' argument is factually incorrect because it is entirely based upon their erroneous assertion that the federal constitutional question was first raised on motion for rehearing in the Texas Supreme Court. In fact, the constitutional issue was fully briefed in the Texas Supreme Court in advance of oral argument, *see* Pet. at I-1-5, J-1-2, had been briefed in the Court of Civil Appeals as well, *see* Petitioners' Brief before Court of Civil Appeals at 3, 8, and had been put in issue in the District Court. *See* Pet. at 5-6.

The constitutional issue was raised adequately for purposes of Texas law: the original pleading, which must be construed as favorably as possible to the pleader, *see Gulf, Colorado & Santa Fe Ry. v. Bliss,* 368 S.W.2d 594 (Tex. 1963), is required only to give "fair notice" of the claim involved. Rule 47, TEX. R. CIV. PRO. *See Stone v. Lawyers' Title Insurance Corp.,* 554 S.W.2d 183, 186 (Tex. 1977). Presumably in recognition of the fact that the issue had been properly raised, respondents made no objection to its presentation in the Texas appellate courts.

Since under Texas law the federal constitutional issue was properly presented and preserved for decision below, it has been preserved for decision by this Court as well. Because "the claim of invalidity and the ground therefor were brought to the attention of the state court with fair precision and in due time . . . , the claim is to be regarded as having been adequately presented." *Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928). It makes no difference that the Supreme Court of Texas did not expressly discuss the federal constitutional question. As this Court also stated in *Bryant v. Zimmerman*:

> [T]he decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough.

278 U.S. at 67. By enforcing respondents' construction of Pub. L. 91-156 against petitioners, the court below necessarily denied petitioners' claim that the federal statute as so enforced would be unconstitutional. Accordingly, this Court has jurisdiction to review that claim.

For the reasons stated here and in the petition for writ of certiorari, the petition should be granted.

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